

REFRAMING PROSTITUTION

**From Discourse to Description,
from Moralisation to Normalisation?**

**Nina Peršak
Gert Vermeulen (Eds.)**



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Chapter 11.

Self-regulation and public-private cooperation in the prostitution sector

The potential of quality standards for the prevention of trafficking in human beings and prostitution-related nuisance¹

GERT VERMEULEN

1. NUISANCE IN THE PROSTITUTION SECTOR

Nuisance in the prostitution sector (Happe, Spruyt, & Suy, 2007) is mainly caused within the contexts of window and brothel prostitution, on the one hand, and street prostitution on the other. The problem is not usually found in the context of the escort sector, due to the private nature of this sector.

On the client side, nuisance may take the form of, for example, kerb crawling, littering, urinating in public, and noise disturbance (yelling, honking,...). On top of that, traditional criminality may also be found (such as theft, damage to cars, burglary, vandalism, gang formation, brawling, and the use and possession of drugs).

On the side of the prostitutes, nuisance problems usually involve (excessively) visible and aggressive methods of touting for clients. Within the context of window prostitution this may take the form of, for example, window tapping (which may disturb neighbours). Within the context of street prostitution, it may entail not only, for example, the hazardous soliciting of passers-by, but also the use of so-called sex drive-ins or 'sex boxes' in public areas such as public roads, parked cars, etc.

Finally, the general problem of the decay of neighbourhoods, especially in the context of window and brothel prostitution, should not be underestimated as a general cause of nuisance. The buildings involved are often in a (very) bad state (no running water, damp, pollution,...), which causes further impoverishment of the neighbourhood (and marginalisation of prostitution), may attract additional nuisance (whether in punishable forms or not), or may function as a natural breeding ground or catalyst for nuisance.

¹ This text is an updated version and English translation of Vermeulen (2007a: 15-26, 2007d and 2008).

2. TRADITIONAL MUNICIPAL SOLUTIONS

A solution for the above-mentioned challenges is usually sought (and sometimes found) at municipal level through a certain (government directed) geographical concentration of window, brothel and street prostitution (if tolerated at all) (Happe et al., 2007).

For window and brothel prostitution, it is not possible for the municipal authorities in Belgium to have a licensing policy that allows for the geographical planning of the spread of the prostitution industry. This is not possible because the exploitation – in the sense of the “management”² – of prostitution remains illegal (and therefore keeping a brothel, or renting out rooms or spaces and making them available for the purpose of prostitution, with an eye to realising an abnormal profit, also remains illegal).

Some cities such as Antwerp have sought an alternative solution for maintaining public order and safety and eradicating, or at least controlling, nuisance: they demand proof of suitability for window prostitution premises or brothels (minimum surface area, running water, toilets, adhering to certain safety norms, adhering to hygiene norms, ...) and for those who apply for them (proof of good behaviour, minimum age,...). As useful as these norms may be, this system does not allow for objective geographical steering, as adhering to the above-mentioned preconditions will prompt a decision that the premises are suitable, no matter what their location.

If the exploitation of prostitution were to be de-criminalised, a special zoning plan could offer an additional judicial (urban planning) instrument to ensure the concentration of prostitution in a certain area (and this would obviously indirectly limit the number of premises). Special taxes on the rent from premises that have become slummy, as well as the adapted law of 2005 concerning slum landlords, can equally prove their purpose in the context of a local prostitution policy. However, they do not directly allow for geographical concentration.

The tolerance level for street prostitution in municipal or city centres is especially low. Tolerance usually depends on the possibility of concentrating prostitution in (a) soliciting zone(s) (which in fact means delocalisation) and adequately providing for lighting, rubbish bins, urinals, ‘sex boxes’, and preferably also of introducing low-key minimum provisions for hygiene, crisis care, referrals, medical care and information about or prevention of health issues, addiction, violence, etc. Official government regulation or governance is difficult, when it comes to both urban planning

² “Exploiting prostitution” is understood to mean being involved in the sex sector as an entrepreneur or manager of a sex establishment.

and criminal prosecution, municipal authorities having insufficient or simply no control over these. Moreover, tolerating soliciting zone(s) requires a selective enforcement of the Criminal Code, since the Code criminalises the enticing of others to indecent behaviour, in any sort of public place and through words, gestures or signs.

Generally speaking, municipal authorities, through all kinds of municipal regulations and police decrees (whether or not maintained through the administrative sanction system), for the purpose of public order, tranquillity and safety (or of public decency), often enforce, through the criminal justice system, several “additional” norms relating to the exploitation of sexual acts or prostitution (Vander Beken, Vermeulen, Steverlynck, & Colle, 2003) (for example, as previously mentioned, the requirement of a declaration of suitability, or determining the distance between a window and the road, regulating the opening/closing of the curtains of prostitution-windows,...).

Such norms should, in particular, allow “the prostitution problem” to be channelled, and render and keep it acceptable to society. The often envisaged geographical concentration or delocalisation policies, put forward to control nuisance, can however not be sufficiently or objectively realised in this manner. We cannot allow for a free fall into scenarios of municipal enforcement of a “moral” public order, without it being proved that the ‘material’ public order is being violated (i.e. that there is an actual disturbance of the public order, safety or tranquillity). Although quite a few (municipal) policy makers are leaning towards this kind of approach, the improper use of administrative authority is unjustifiable (Vermeulen, 2004) and, hence, can be successfully contested through a procedure before the Council of State (Vander Beken, 1993-1994). Moreover, a genuine licensing or urban planning policy or the establishment of (a) soliciting zone(s) is close to impossible due to the current state of the legislation.

Certain norms enforced at municipal levels, such as minimum norms for prostitution premises and their owners/managers/landlords, are (likely to be) useful in the context of fighting (perceived) public nuisance. There is a question of whether norms of this type can best be created, controlled and enforced (only) at the governmental level, or whether the paths of public-private cooperation or mere self-regulation (at the level of the prostitution sector) would be (more) useful here.

This question is all the more urgent because the current municipal prostitution-specific norms as a whole do not contain (nor can they – *infra*) a single criterion (except merely indirect criteria such as the demand for proof of good behaviour on the part of applicants for a certificate of suitability) to ensure the protection of prostitutes against exploitation or forced labour, and thus against human trafficking. It is, however, clear that where human trafficking (with subsequent exploitation and abuse) prevails,

(punishable) nuisance in and around the sectors concerned is exponentially more significant than where it does not prevail.

This paper explores the extent to which public-private cooperation or self-regulation scenarios can better achieve the twin goals of fighting and preventing human trafficking (Vermeulen, 2007a, 2007b and 2007d), and avoiding traditional nuisance in the prostitution sector.

The traditional (municipal) approach to nuisance in the prostitution sector has been adequately explained. Before answering the research question, it is necessary to touch briefly upon the parallel goal of not only fighting against but also preventing human trafficking in the prostitution sector; from a human rights perspective, this must be considered the more important end-goal of prostitution policies.

3. VULNERABILITY OF THE PROSTITUTION SECTOR TO HUMAN TRAFFICKING

An important component of human trafficking is still linked to exploitation for sexual purposes. The link with window and brothel prostitution and the escort sector is inevitable. The public character of street prostitution (and the relative difficulty of using coercive measures in the public eye) means that street prostitution, contrary to what was written above regarding nuisance, is not connected as such with human trafficking.

In contrast to the escort sector, which traditionally has never been particularly associated with human trafficking (possibly because it has been quite justly presumed that it primarily concerns consensual or independent activities), it has been assumed for a long time that, in most cases of window and brothel prostitution, unsuspecting women are lured and forced into prostitution, and that they are locked up, humiliated and beaten. Today this stereotype no longer corresponds with reality. This position has even been proved by official studies on female victims of human trafficking who are registered with Belgian victim support centres (Vermeulen, Van den Herrewegen, & Van Puyenbroeck, 2007). Foreign and illegal prostitutes appear, in many cases, to move to Belgium with full awareness and prior knowledge of the sector in which they will be put to work. This does not mean that it was an easy choice, or that possible problems of exploitation, underpayment or bad working conditions may not arise afterwards. These latter problems, moreover, also apply, at least to a certain degree, to escort work. Even if the escort work was initially chosen on a completely voluntary base, the risk that the initial consent was based on inadequate or imprecise information regarding the actual working circumstances is certainly far from imaginary. Escort work is often conducted on the basis of assignments, and thus under conditions imposed by an agency or company. Obviously it remains highly problematic if those conditions eventually result in unhappy

surprises for the – initially consenting – person involved, in relation to, for example, the nature or frequency of work, the level of control, the remuneration, the possibility of leaving or refusing and the physical and health conditions in which one needs to perform one's duties (not least in relation to unsafe sex). The risk of human trafficking in both these subsectors of the prostitution sector (so prostitution other than street prostitution) remains, at least to a certain extent. This is particularly true now that it has become clear that the legalisation of voluntary brothel and window prostitution has provoked a movement towards the – non-regulated and much more concealed – escort branch, when, as in the Netherlands (*infra*), no adequate measures to prevent this are foreseen. As such, the whole prostitution sector (apart from street prostitution) will remain intrinsically marked by a heightened potential vulnerability to exploitation and thus to human trafficking – even where, as in Belgium, it generally concerns initially consensual services.

4. PROBLEMATIC BLURRING OF PROSTITUTION AND HUMAN TRAFFICKING POLICIES

It must be noted that today there is still too much confusion between the policy debates on prostitution and on human trafficking, in the sense that the human trafficking ideology dominates the debate on prostitution policy.

There is a lack of nuance, as the unrealistic view is maintained that even the transportation, transfer or housing of a person with a view to making a profit from this person's prostitution services that will be provided with informed consent can be considered to be human trafficking. This is manifestly incorrect. The actual reason for criminalising human trafficking can be found in the element of coercion or lack of freedom, even though this is not recognised by the revised Human Trafficking Act of August 2005 (Vermeulen, 2005). According to Article 433 *quinquies* of the Criminal Code, which was inserted by this Act and which is contrary to the current international consensus of the definition of human trafficking (in the UN Human Trafficking Protocol of November 2000, the EU Framework Decision of July 2002 that has, in the meantime, been replaced by the EU Trafficking Directive of 2011, and the Council of Europe's Human Trafficking Convention of May 2005), there can be human trafficking without there being any coercion, violence, threats, misleading information, fraud, abuse of power, vulnerability, and so on. Consent is irrelevant. In other words, Belgium opted for the use of the term human trafficking with its core characteristic being missing. However, it is in forced exploitation, employment, slavery, etc. that the rationale behind the fight against human trafficking should be detected.

Moreover, when the two debates are confused, there is a real threat that, in fact, a battle is waged against non-coercive prostitution (from the moral dogma that a free choice to provide sexual services is intrinsically impossible), against nuisance (which, as we have seen, can be linked to some forms of prostitution) or against immigration (because the exploitation of prostitutes from third countries remains illegal by definition, in countries such as the Netherlands, even after the lifting of the ban on brothels). A quasi-automatic qualification of the prostitution sector as a breeding ground for human trafficking, and the subsequent repressive action in that field, actually mainly and negatively affect illegal prostitutes or those who have otherwise made the undoubtedly difficult but informed choice to offer sexual services for money. This definition misses the nuances and precision that are necessary for a focused targeting of the real exploiters and organisers of forced prostitution.

5. “SEPARATION OF MARKETS” IN THE PROSTITUTION SECTOR

It is exactly that nuance and precision that can be found in the separation, on both a policy and an enforcement level, of the prostitution market into a *mala fide* (human trafficking) market segment and a *bona fide* (without human trafficking) market segment. The core question here is to what extent measures that are focused on regulating, controlling and tolerating, from a criminalisation point of view, the *bona fide* market segment³ could have a positive effect on the prevention of human trafficking and the further actual repression of the *mala fide* market segment. In attempting to bring about such a “separation of markets”, there are, by and large, two theoretical options: a genuine legalisation of the non-exploitative and non-coercive forms of sexual servicing, or the strict regulation and limited tolerance of prostitution.

6. LEGALISATION

The route of the legalisation of the non-exploitative and non-coercive forms of the management of prostitution by adults originates from the premise that at least adults (for minors having reached the age of sexual majority the issue is more sensitive and disputed) have, or should have, to decide for themselves whether or not they want to offer sexual services or performance for money. As a consequence, running a prostitution establishment or an escort company, in the absence of any form of coercion, should not be a criminal act, and every prohibition should be lifted. A policy

³ I.e. the less problematic segment that is based on informed consent and the legal protection of prostitutes.

that does not punish the non-exploitative exploitation (the exploitation solely focused on profits) of sexual services or performance that are offered with informed consent, and that gives adult sex workers the same rights as any other working citizen, conceptually serves a dual purpose. It not only recognises a fundamental right to self-determination of the individual, but it also allows for a more effective approach towards real exploiters and human traffickers within the prostitution environment, by distinguishing more clearly, and by obtaining a clearer view on, the *mala fide* segment of the sector. Herein also immediately lies the essential theoretical advantage of legalisation in the fight against human trafficking for the purpose of sexual exploitation. By normalising working in the *bona fide* market segment (for example in the form of a recognition of a person as an employee or as a self-employed person and the granting of social security rights from a so-called “labourist” vision), and also by immediately offering *bona fide* ‘entrepreneurs’ the legal security that comes with legal business management, we at the same time increase the chances that the *mala fide* market segment will not only decrease but can also be more easily held within the criminal law loop. At the September 2004 World Conference of the *Association Internationale de Droits Pénal* (Beijing), a majority of attendees (who had also taken part in a preparatory world conference on this topic in Rio de Janeiro in April 2002) were of the opinion that there could be no human trafficking when adults freely agreed to be hired, transported, transferred, housed, incorporated or put under someone else’s control for the purpose of non-exploitative prostitution. In an earlier phase of the conference preparations (Noto, June 2001) it was specified in that context that, for the purpose of allowing law enforcement authorities to focus their attention on human trafficking for the purpose of sexual exploitation, countries could opt to de-criminalise forms of non-coercive and non-exploitative employment in, or organisation of, the prostitution of adults. The policy debate about the regulation or even legalisation of the exploitation of prostitution is happening in many countries, outside and within the European Union. In October 2000 such legalisation was adopted in the Netherlands. A few years after the lifting of the ban on brothels, opponents of legalisation pointed to the relatively meagre results of the operation. However, the limited success of the Dutch legalisation exercise (which has, as mentioned earlier, even been accompanied by certain displacement effects, with the previously illegal but visible brothel prostitution giving way to more concealed forms of prostitution, such as escort work and apartment prostitution) did not appear to be inherently linked to legalisation itself. Instead, it was the case that the, at least partial, failure could be traced back to the lack of certain prerequisites and subsidiary measures for a successful legalisation. The manifestly weak points of the lifting of the ban on brothels were (are) that a legal framework was only created for working with prostitutes from EU Member States, that

an effective criminal law approach to the market segments that remained illegal lagged well behind, and that the municipalities – due to the decentralisation of the licensing policy (although since then the licensing conditions for “sex establishments” have been unified throughout the nation,⁴ which constitutes an important step forward) – have all too easily been able to pursue a zero tolerance policy. The Dutch example just demonstrates that the manner in which legalisation is conceptualised and embedded is particularly crucial to its success. Let us evaluate this step by step.

First, legalisation only applies to EU subjects, especially within the philosophy of the right to free establishment for EU subjects for self-employment activities within the EU.⁵ According to the law lifting the ban on brothels, an employment permit cannot be granted for “employment completely or partly consisting of performing sexual services with or for third parties”, meaning that third country nationals by definition remain or become involved in illegality. Conceptually the Dutch legalisation exercise not only fails to recognise reality (a significant proportion of the prostitutes in western European countries come from third countries), but it also largely undermines its own potential success in advance. It has been alleged that the Dutch Cabinet was well aware of this shortcoming and that the chosen policy option consciously sought to target illegal third country nationals.

Secondly, tackling the remaining illegal segment of the prostitution sector has generally remained of less importance. Evaluations of the Dutch regulation have pointed out that the police were (and are) mainly occupied with checks (in the context of the administrative supervision) in the regulated sector. Consequently, there was (and is) a lack of capacity for the meaningful supervision and detection of punishable forms of the exploitation of prostitution outside the regulated sector. This lack of capacity, however, is essential for making (and keeping) the system of regulation sufficiently attractive for those who wish to comply with the licensing rules, which in turn supports the entire system.

Finally, there was a problem with the decentralisation of the policy. That decentralisation has created a total lack of uniformity in the prostitution and licensing policies at the local levels. Even though each municipality was

4 *Regels betreffende de regulering van prostitutie en betreffende het bestrijden van misstanden in de seksbranche (Wet regulering prostitutie en bestrijding misstanden seksbranche)* (32211). No. 3. *Memorie van Toelichting*. Tweede Kamer, Handelingen 2009-2010, *Algemeen deel, Hoofdstuk 1 Inleiding, 1.2 Inhoud wetsvoorstel*.

5 See on this topic the decision of the European Court of Justice of 20 November 2001, case C-268/99, (*Jany v the Netherlands*, 2001).

obliged by law to formulate a prostitution policy and allow at least one brothel on its territory, most municipalities formulated their policy in such a way that new enterprises were not eligible for a permit. Under the auspices of the fight against nuisance, or enabled by anti-prostitution municipal development plans, the municipalities often banished brothels to totally unattractive locations. In a large part of the Netherlands this could be reduced to a hidden zero tolerance policy in respect of legal brothels. In some cases it even amounted to an improper use of administrative authority, at the expense of the prostitutes employed in the relevant brothels. The withdrawal of the licences of one third of the sex establishments in the Amsterdam red light district⁶ at the end of 2006 after the screening of their managers on the basis of the BIBOB Act (*Wet Bevordering Integriteitsbeoordelingen door Openbaar Bestuur*; the Public Administration Probity Screening Act) shows, moreover, that even in cities such as Amsterdam (which obviously does not pursue a zero tolerance policy) the prostitution licensing policy has been used as an instrument. Brothels were apparently being administratively closed, without this having anything to do with a violation of the licensing conditions, merely in order to give a *de facto* punishment to managers who were suspected of drugs trading and money laundering but against whom regular criminal investigations were deemed unlikely to succeed.

In many countries, including Belgium, the legalisation of non-exploitative forms of sexual services offered with informed consent is perhaps one step too far. Even though an improvement in the position of prostitutes was announced in the federal coalition agreement of July 2003 ("the social and legal uncertainty of prostitutes will be ended"), there has so far been no broad political support for the legalisation of the exploitation of non-problematic adult prostitution. The Human Trafficking Act of August 2005, as mentioned earlier, has more than ever brought the exploitation of prostitution into the human trafficking realm. A second – legal – obstacle to a better protection of prostitutes remains the UN Human Trafficking Convention of 1950; unlike the position in the Netherlands, this was ratified by Belgium (as by most countries around the world). The convention reflects a pure abolitionist view with regard to prostitution, and demands that any form of exploitation of prostitution be made punishable, irrespective of the form and even in the case of the (informed) consent of the prostitute. In ratifying countries this has led to the paradoxical situation that working as a prostitute is not punishable, in contrast to all aspects that are connected with working as a prostitute, whether as a self-employed

6 "Amsterdam City Council closes 155 brothels. Happily bonking on in the red light district" ("Amsterdams stadsbestuur sluit 155 bordelen. Vrolijk voortwippen op de walletjes," 2006).

person (because this includes advertising and renting out rooms in which to offer sexual services), or under the authority of a “manager” (because this is the exploitation of prostitution). That is why for years – including in Belgium – several people have pleaded for the UN Convention to be altered or dissolved. This would clear the way for an (inter)national decriminalisation of non-exploitative and non-coercive employment in, and organisation of, the prostitution of adults.

7. REGULATION

In the short run, it is likely that more is to be expected from the mere regulation of the sector, without taking the step to formal legalisation. In this way, the less problematic – due to the informed consent and legal protection of the provider of sexual services – and, thus, *bona fide* market segment remains subject to the Criminal Code, although this is not being enforced.

Market separation in illegal sectors is not at all new in itself. It is in fact rather common. One should think of, for example, the drugs market or child labour. The mere possession of cannabis for consumption for personal use is often (and not just in the Netherlands) not prosecuted, even though it is punishable, as long as it is not problematic in other ways (such as minors being involved, or there being nuisance and so on). Thus a distinction is made, in an institutionalised manner, between possession of cannabis and other drugs crimes that have (a higher) prosecution priority. In relation to child labour, which is prohibited in principle, the International Labour Organisation (ILO) in 1999, via Convention No. 182 that banned the worst forms of child labour (labour in prostitution, child pornography, etc.), introduced a distinction between these worst forms and other, albeit punishable but still less problematic, forms of child labour. In the same sense the ILO makes an especially useful distinction between “forced labour”, which they recognise as the core element of human trafficking, and other violations of labour or social security norms that are of a lower order. In that sense it is – in the fight against human trafficking for the purpose of sexual exploitation – perfectly legitimate to pursue, with priority, the ending of forced sexual servicing, while at the same time reducing the enforcement of other, secondary standards (good morals, legal employment etc.). This is merely a question of having clear priorities within the investigation and prosecution policy and adequately making the municipal (administrative) sanctioning policy correspond.

7.1. Government regulation

To a certain extent, in Belgium we witness a tendency for regulation of the sector when it comes to the exploitation – in the sense of the management –

of sexual servicing. This is, as previously mentioned, especially the case at the level of the municipal authorities that, through all kinds of municipal rules and police regulations, impose norms that are enforceable in the criminal law system (even if these can sometimes be sanctioned with administrative sanctions) for the purpose of public order, tranquillity and security, on sex establishments. As indicated earlier, this especially entails the imposition of norms based on the prevention of nuisance and the upholding of good morals, which allow the channelling of the “prostitution problem” and for it to be made and kept digestible for society, without it being possible to pursue a real concentration or delocalisation policy in an objective manner. Such rules, in theory, actually add new offences to those already embedded in the Criminal Code (which prohibits the exploitation of sexual servicing altogether), although they are based on a different rationale and protect different values. That is why these offences are not considered incompatible with the nationally applicable criminal prohibition on “exploiting” – again in the sense of managing – sexual servicing. To a certain extent this actually works, mainly because of the non-prosecution policy with regard to the main rules that are embedded in the Criminal Code. However, such a regulatory policy remains very diffuse, since it remains highly dependent on variations in the municipal policy and the local prosecution policy. On top of that, the regulatory policy is ambiguous, because it does not offer adequate legal certainty to the sector’s stakeholders (the providers of sexual services, and the brothel and window “managers”). As mentioned before, the municipal sexual servicing policies do not promote any norms that actually ensure the protection of the providers of sexual services against exploitation and forced labour (as municipalities, if they did this, would go against the standardisation in the Criminal Code itself, such as e.g. Article 433 *septies* concerning severe human trafficking), norms which could as such be complied with quite easily by the sector in order to stay prosecution-free. On the contrary, the norms imposed are put in the broader context of the municipal competence concerning public order, tranquillity and safety, which can be handled with quite a wide degree of discretion and randomly changed quite easily, and can also be easily (whether or not suddenly) enforced on a municipal level for a variety of reasons other than tackling *mala fide* “managers” or pimps who exploit or force their victims into the sex sectors (a municipality does not monitor this) or who fail to abide by sector-specific municipal rules or regulations by, for example, causing actual nuisance. Consciously and willingly complying with norms that only proscribe working with adults who have given their informed consent, and that require nuisance to be avoided and good morals not to be disturbed, does not offer a guarantee to managers of sex establishments that they will not be subjected to, for example, administrative targeting (Van Heddeghem, Vander Beken, Vermeulen, & De Ruyver, 2002), or a raid to detect illegal employees or

illicit work, or even actual criminal prosecution. The organisation of and the working in the *bona fide* segment of the sexual services market is not consistently rewarded, not even when one follows additional sector-specific municipal norms. This is ambiguous.

7.2. Self-regulation

Maybe the better option is therefore that the *bona fide* part of the sector imposes specific quality norms on itself, and that it commits to monitoring and enforcing these norms, without in this way becoming too susceptible to the volatility of municipal agendas. This would bring clarity and stability in the norms, which is essential for avoiding or fighting exploitation and forced sexual services or, to put it better, human trafficking for the purpose of sexual exploitation in the actual sense of the word. In parallel, such standards can help to limit the municipal nuisance concerns.

In a study financed by the European Commission (JLS/2005/AGIS/063) by the Institute for International Research on Criminal Policy (IRCP) of Ghent University (Vermeulen, 2007b), sector- or activity-specific quality norms were developed with an eye to the prevention of human trafficking and the sexual exploitation of children, for a broad range of private sectors/organisms in a wide range of activities. Institutional research partners in the study were the Institute for Legal Sciences of the Hungarian Academy of Sciences, the Department of European and International Public Law of Tilburg University and the Service for Criminal Policy (*Dienst voor het Strafrechtelijk Beleid*) of the Belgian Ministry of Justice.

The quality norms entailed standards for, for example, the classic prostitution and escort sector. The study also examined – through empirical research carried out in the Netherlands – whether support for this idea could exist or does exist in the minds of several stakeholders (establishment “managers”, prostitutes, escorts, clients, police/justice departments, NGOs,...). The choice of the Netherlands was made because the prostitution sector has been partly legalised since the lifting of the ban on brothels in 2000. Research-wise, it was thus plausible that useful experiences with existing legal norms could be collected, and that the possible added value of (additional) quality norms, to be introduced through legalisation or (self) regulation, could adequately be assessed (and an extra benefit here is the relative openness in the sector, to which the lifting of the ban on brothels has contributed). The research hypothesis was precisely that a system of self-regulation within the prostitution sector, by means of quality norms that all involved parties would deem valuable, appropriate and adequate to prevent and exclude human trafficking and the sexual exploitation of children to a maximum level, could be a useful alternative for the traditional (criminal) law system or (municipal) government actions – or control in the broad sense. Conducting the empirical research in the Netherlands (where

broad support for the idea was detected) obviously means that its conclusions cannot easily be transposed into countries – such as Belgium – where the legalisation (even partial) of prostitution appears to be politically unfeasible (in the short term).

However it is – at least theoretically – plausible that the classical ambiguity that comes with government regulation and the monitoring of illegal or informal (economic) activities can be avoided through self-regulation on the basis of quality norms or via legalisation (Vermeulen, 2007c). Also it has already been demonstrated in practice that self-regulation in the prostitution sector has much potential.

An example can be found in Antwerp, more specifically in the “Protocol concerning the rental prices for window prostitution” that has been in place for many years now. The protocol was the result of informal consultation at the level of the sector itself: between prostitutes, owners of buildings and “managers”. Its purpose is two-fold: on the one hand using a maximum price that is acceptable for all parties involved (and subsequently setting the rental prices for a workspace or window and for the use of common spaces belonging to a window prostitution building), and on the other hand the determination of a measuring tool for measuring what is abnormal profit for renting, selling or offering rooms or other spaces for the purposes of prostitution. Such selling, renting out or putting at disposal, with the intent to realise an abnormal profit, is, of course, punishable under Article 380, §1, 3° of the Criminal Code, which was inserted in the Criminal Code by the Human Trafficking Act of 1995. With this protocol the sector demonstrated that it was capable of coming to acceptable rental agreements – with the full agreement of the prostitutes as the most important parties involved. How could the police and prosecution authorities possibly still argue that rental prices that respect the protocol are focused on abnormal profit? This example illustrates that agreements made at the level of the sector and monitored by the sector have the potential to serve as a basis for a tolerance policy, in which criminal prosecution is *de facto* reserved for situations in which protocol agreements are not followed. The sector thus delivers its own interpretation of criminal law concepts and demonstrates that it is willing and capable of *bona fide* behaviour, stimulated by the promise of non-prosecution.

In other words, it is plausible that self-regulation and monitoring, and a criminal tolerance of the *bona fide* sexual services market, has, on the one hand, a positive effect in terms of the prevention of human trafficking and, on the other hand, actually enhances the repression of the *mala fide* market segment.

Quality standards for the prostitution market can, for example, include (Vermeulen, Balcaen, & Van Puyenbroeck, 2007): sexual services or performance only being given or delivered by adults who have given their

informed consent; services/rooms for prostitutes only being rented out at all-in prices without abnormal profit margins; a clean and safe working environment being provided for prostitutes; the required insurances being obtained; a right to protected sex being granted; the cost of regular medical checks (including checks for HIV and other STDs) by a doctor of their own choice being refunded; no excessive work days or hours, and no under- or non-payment being permitted; a sex worker having the right to decide for herself or himself to offer services while she is having a period or during pregnancy or when he or she has an STD; sex workers having the right to refuse certain customers/partners or certain sexual actions (even though this can of course lead to a breach in the working relationship with a manager); the manager or owner of a sex establishment or window having at least a functionally clean criminal record (meaning, at a minimum, no prior convictions for sexual offences, sexual exploitation, human trafficking, or other crimes committed in this context), and the active permission for monitoring by authorities (police, inspectorates, etc.).

With respect to this last standard, the importance of, first, monitoring the recognised and publicised quality norms via a monitoring mechanism at the level of the prostitution sector itself must be emphasised. To this end, the sector has to offer absolute transparency and be open to possible additional checks by governmental authorities. Primary governmental monitoring is irrelevant in a system of self-regulation and monitoring; the benefits and adequacy of this should not be questioned because the system has economic benefits for the sector itself. It is even a contradiction in terms. Also, as mentioned above in the context of the evaluations of the Dutch legalisation, the police should avoid at all costs mainly carrying out checks in the regulated sector, as this leads to a decreased capacity for the necessary monitoring and detection of that part of the prostitution sector that has, by not recognising the quality standards, not (yet) labelled itself as being *bona fide*. The enforcement focus must, in other words, be on the *mala fide* or the not *bona fide* market segment.

For (self)regulation to work, the detection and prosecution authorities must be willing not to act against the exploitation of adult prostitution, even when those who offer sexual services in that context have an illegal residence status. Outside a legalisation scenario, a regulation scenario that is floating on an institutionalised conditional tolerance policy does not hold the disadvantage that the employment of illegal third country nationals in a legal framework causes a contradiction. In a continued illegal but tolerated *bona fide* segment of the prostitution market, it is usually impossible to create legally binding contracts, since these go against good morals.

It is of course necessary that, on a municipal or prosecution level, it remains possible to act against manifest nuisance and against infiltration of the *bona fide* prostitution market by persons who (want to) use this as a vehicle for

such things as money laundering, human trafficking, organised crime, and drugs trading.

In the end it is obviously mainly the sector itself that must see the advantage of strict compliance with certain – publicised – norms. The sector can commit to an ethical engagement that can free it of its reputation of being intrinsically linked to human trafficking. Furthermore, a complete refusal by the *bona fide* entrepreneurs to allow forced sexual services must allow them to avoid criminal prosecution. Finally, quality certification offers additional economic benefits and potential. There is a tendency nowadays to criminalise those who consciously make use of (among others sexual) services offered by victims of human trafficking (this tendency was promoted in the Council of Europe Human Trafficking Convention of 2005 and was proposed in Belgium in 2007)⁷. It is thus of increasing importance that consumers of sexual services can have a guarantee that they use these services in an ethically responsible manner, so that they can remain free from prosecution. This implies that they can consciously choose services that are free of the risk of criminalisation, and services that are offered with informed consent and in proper legal and employment circumstances – and thus by people who are obviously not victims of human trafficking. Consumers can in such cases best call on establishments that are certified and thus in compliance with the quality standards explained above, in the same way as they might choose products holding a “fair trade” or “quality butcher” label or ISO-certified services (Vermeulen, 2007d).

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⁷ *Wetsvoorstel tot invoeging van een artikel 380quater in het Strafwetboek met betrekking tot het gebruiken van diensten van seksuele aard geleverd door een slachtoffer van mensenhandel*, Gedrukte Stukken, Belgische Senaat, 2007-2008, No. 4-257/1.

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